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IN THE

# Supreme Court of the United States

**October Term, 1960.**

**No. 233.**

BERNHARD DEUTCH,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.**

# BRIEF FOR PETITIONER.

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## MISCELLANEOUS.

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## BRIEF FOR PETITIONER.

### OPINIONS BELOW.

The judgment and sentence of the District Court are not reported; they appear on pages 27, 28 and 30 of the record. The opinion of the Court of Appeals is reported in 280 F. 2d 691 (1960) and on pages 330-339 of the record.

### JURISDICTION.

The judgment of conviction was affirmed by the Court of Appeals for the District of Columbia Circuit on June 18, 1960. The Petition for a Writ of Certiorari was filed on July 13, 1960 and the writ was granted on October 10, 1960. The jurisdiction of this Court is under 28 U. S. C. § 1254(1).

## QUESTIONS PRESENTED.

Petitioner appeared in response to a subpoena, and under protest as to the "constitutionality" of the proceeding and the "jurisdiction" of the committee, testified fully before a subcommittee of the Committee on Un-American Activities of the House of Representatives concerning his past activity as a member of a student Communist group on the campus at Cornell. He refused to answer certain questions identifying by name his associates. He was subsequently indicted for contempt and convicted of violating 2 U. S. C. § 192. The questions presented are:

1. In determining whether a witness was aware of the subject under inquiry, can he be charged with legal knowledge of statements of subcommittee chairman and of testimony of other witnesses, of which he has no actual knowledge?

2. Is the requirement that the subject matter under inquiry appear to the witness with undisputed clarity waived because the witness, in voicing objection to the committee's jurisdiction to ask the questions, does not specifically object to pertinency?

3. Must the subject of the inquiry proved by the government at trial under 2 U. S. C. § 192 be the same as the subject matter covered at the hearing?

4. If the witness were aware of the subject of the hearing, which subject, if proved at trial would sustain a conviction under 2 U. S. C. § 192, may the conviction be sustained if the government at trial proved another subject of which the witness was unaware?

5. May a conviction under 2 U. S. C. § 192 be sustained on appeal by finding a subject under inquiry at variance with the subject proved by the government at trial?

6. Where a witness has disclosed every aspect of the activities, character, aims and extent of a student Communist group, withholding only names, is there a valid legislative purpose in the acquisition of such names?

7. In determining whether the First Amendment protected petitioner from compulsory disclosure of past political association, should the doctrine of *Barenblatt v. United States*, 360 U. S. 109 (1959), be extended in favor of the investigative power and in derogation of the protection of the First Amendment?

## STATUTES INVOLVED.

2 U. S. C. § 192, R. S. 102 (52 Stat. 942), as amended, provides:

> "Refusal of witness to testify.
>
> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

Public Law 601, Section 121, 79th Congress, 2d Session (60 Stat. 812, 823, 828) provides in relevant part:

> "(b) Rule XI of the Rules of the House of Representatives is amended to read as follows:

"Rule XI

"*Powers & Duties of Committees*

"(1) All proposed legislation, messages, petitions, memorials, and other matters relating to the subjects listed under the standing committees named below shall be referred to such committees, respectively: . . .

* * *

"(q)(1) Committee on Un-American Activities.

"(A) Un-American activities.

"(2) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

## STATEMENT.

Petitioner, Bernhard Deutch, is a nuclear physicist employed by The Bartol Foundation, a non-profit corporation affiliated with the Franklin Institute of Philadelphia. In the early 1950's, he was an undergraduate at Cornell University and did a year of graduate work at that University and there received his Master's degree. He then undertook studies at the University of Pennsylvania where he obtained his Doctorate of Physics and while there, at the age of 24, in the course of work as a laboratory assistant at the Medical School of the University of Pennsylvania (work which he undertook in order to help finance his studies), he was the co-discoverer of the cause of throm-

bosis and the co-author of the paper announcing this discovery, which was read before the American Physiological Society at its annual meeting in November of 1954.

On April 7, 1954 in the Physics Building of the University of Pennsylvania, Deutch was served with a subpoena commanding him to appear before a subcommittee of the House Committee on Un-American Activities in Albany, New York, on Friday, April 9, 1954, at 10:30 A. M. Upon request of his counsel the hearing was actually held on April 12, 1954 in Washington, D. C.

At this point Deutch knew only the following:

1. That a certain Ross Richardson had named him as a member of the Communist Party while he had been at Cornell, which fact he knew only from newspaper accounts; and

2. That he had been subpoenaed as stated above.

Upon appearance at the committee's office in the House Office Building in Washington, he and his counsel were directly shown into an office in which there were seated several unidentified men; he was forthwith sworn and, without preamble the questioning commenced. At trial the government established that some of the individuals present in the room consisted of a subcommittee of the Committee on Un-American Activities but there is no evidence in the record that that particular subcommittee ever heard any other witnesses on any subject. It is affirmatively shown by the record that all of the other subcommittees which held hearings on various subjects pursuant to a course of inquiry of which petitioner's hearing was alleged to have been a part, were different subcommittees with different subcommittee chairmen and different members.

After introductory questions of the petitioner's name and address, committee counsel stated:

"Mr. Deutch, during hearings at Albany last week, the committee heard testimony regarding the existence of a Communist Party group or cell operating among

undergraduates at Cornell University, among certain graduates at Cornell and in the city of Ithaca.

"In connection with that testimony, the committee was informed that you were a member of one or more of those groups. If so, I would like to ask you certain matters relating to your activity there.

"Were you a member of the Communist Party at Cornell?" [R. 293]

The petitioner objected to "the jurisdiction of this committee" and answered "under protest as to its constitutionality". *The petitioner thereupon freely answered all questions concerning himself and testified fully as to the activities of the student group but refused to identify individuals by name.* He told the committee that he was no longer a member of the Communist Party, but that he had been a member of the student Communist group at Cornell and that "when I was in the Communist Party all that happened were bull sessions on Marxism and some activities like giving out a leaflet or two. The people I met did not advocate the overthrow of the government by force and violence and if they had I would never have allowed it" [R. 302].

Deutch told the committee that at the age of 13 or 14 he had read many books on Marxism which had impressed him and that he finally joined the Communist Party at Cornell at the age of 19. He went on to say that the time of his quitting the party would be approximately the time of the last meeting he attended, to which meeting he had been conducted by Ross Richardson, an employee of the FBI, although he also thought that perhaps the "last meeting" he attended was with Mr. Ross Richardson alone.

At one point the committee counsel stated to Deutch that Ross Richardson had stated that petitioner knew the identity of a certain member of the faculty at Cornell who had presumably been a member of the Communist Party and the committee asked petitioner to state the name of

that person. Petitioner, after pointing out that Richardson himself had informed him that the individual in question had quit the Communist Party, respectfully told the committee that he was willing to tell all about his own activities but that he could not, because of moral scruples, bring himself to inform on other people. The assertion by petitioner that Ross Richardson had informed the committee that the individual in question had left the Communist Party was erroneous. Petitioner knew that he had so informed Ross Richardson on the campus at Cornell at a time when petitioner did not know Richardson was an FBI agent, and assumed that when he heard that Richardson had testified and had revealed his role as an FBI agent that he had told all to the committee. Since petitioner was, of course, not present when Richardson testified and since his testimony was not available (even to counsel) until published by the committee some months later, petitioner had no knowledge of the contents of Richardson's testimony other than a newspaper account.

Although committee counsel (Mr. Tavenner) had also questioned Richardson, he did not, at petitioner's hearing, correct petitioner's erroneous assumption as to this particular of Richardson's testimony.

Deutch went on to state that the group on the campus actually became defunct and that during the whole time of his membership in the Party he never found out where the local branch of the Communist Party was; that he did not know what the central committee of the Communist Party of Ithaca did; that he was, to his knowledge, the only graduate student who was a member of the Communist group (petitioner never had a Party card); and in protesting the committee's efforts to obtain the names of his associates, petitioner said, "I think—I happen to have been a graduate student—the only one there, and the organization is completely defunct, and the individual you are interested in was not even a professor. The magnitude of this is really beyond reason." To which protest one of the individuals

present (who in the committee print is identified as Representative Jackson) replied:

> "That decision does not rest with you as to whether or not the scope of this inquiry—as to whether or not certain individuals are important now or not. That is the responsibility of we representatives to determine. That determination cannot rest with you. It may be very true that the individual to whom you have referred is no longer a member of the Communist Party. However, that is a supposition on your part—and a supposition which the committee cannot accept." [R. 295]

In reference to the petitioner's having stated that he had moral scruples against informing on others, one of the individuals present (identified in the committee transcript as being Representative Doyle) stated that it was the committee's duty to investigate "all Communist activities" and they were inquiring "into the extent" and that "this question goes into the extent".

Subsequently, the House of Representatives voted a contempt citation against petitioner and he was indicted for violation of 2 U. S. C. § 192.

The counts upon which the petitioner was convicted and sentenced to 90 days and a fine of $[redacted] set forth the questions as follows:

> 1. The committee was advised that a witness by the name of Ross Richardson has stated that you acted as liaison between a Communist Party group on the campus and a member of the faculty at Cornell, and that you knew the name of the member of that faculty, who was a member of the Communist Party. Will you tell us who that member of the faculty was?
>
> 2. Will you tell the committee, please, the source of that $100 contribution, if it was made?

3. [Judgment of acquittal.]

4. Were you acquainted with Homer Owen?

5. The witness is directed to give the name of the person by whom he was approached.

At trial, the government offered documentary evidence [1] of statements made by *other* chairmen of *other* subcommittees of the House Committee on Un-American Activities at *other* places and *other* times objected to as irrelevant) which established that *those* chairmen stated that *those* subcommittees were investigating Communist activities in the Albany area [G. Exh. 1], [R. 39], or in the Chicago area [G. Exh. 2], [R. 194] or "investigating Communism within the field of labor" [G. Exh. 3], [R. 272].

The government presented one witness (subcommittee counsel, Tavenner), who testified that the subject of the hearing was Communist activities in Albany. No evidence was presented tending to show that the subject of petitioner's hearing was communism on the Cornell campus and government witness and counsel negated this subject.

1. The documentary evidence introduced by the government consisted of specified pages from documents published by the committee. Only the pages designated by the government were ever introduced into evidence. These pages were physically contained in booklets and apparently government counsel had the court trial reporter mark the face of the booklets "Government's Exhibit 1, etc.". On appeal to the Court of Appeals, petitioner printed in the Joint Appendix only the admitted excerpts. Upon compilation of the record in this Court, the Clerk of this Court used the original documents forwarded to the Clerk's Office by the Clerk of the District Court instead of the Joint Appendix and since the entire booklets had been marked on their face as "Government's Exhibit 1, etc.", the entire booklets were inadvertently printed and now appear *in extenso* in the record. Thus, approximately three-quarters of the 341-page record is not in evidence and was erroneously printed. On the back of the front cover of each record will be found a table of errata setting forth the pages of the record which are not in evidence and have nothing to do with the case, and should be ignored.

The trial court (Holtzoff, J.) without a jury, found that "the committee was investigating the infiltration of Communism into educational and labor fields" [R. 30]. On appeal, the government urged that the subject under inquiry was the *inter-relationship* between the fields of labor and education. The Court of Appeals found that petitioner was, or should have been, aware of the subject matter under inquiry and the pertinency of the questions thereto but did not state specifically what the subject matter was [R. 330].

On October 10, 1960, this Court granted a Writ of Certiorari.

## SUMMARY OF ARGUMENT.

### I.

Petitioner contends that although he did not ever specifically object to any particular question on the grounds of pertinency in so many words, that he voiced such objections by way of his general objections to the committee's jurisdiction and the constitutionality of the proceedings, plus a somewhat extended colloquy protesting the triviality and irrelevancy of the names of others, as to place him within the rule of *Watkins v. United States*, 354 U. S. 178 (1957) as having raised such objections as to require explanation by the committee of the subject matter and the purpose of the inquiry.

Petitioner had considerably less information as to subject matter than did Watkins and far less than the defendant in *Barenblatt v. United States*, 360 U. S. 109 (1959). Both petitioner and Watkins openly revealed that their *motivation* in withholding names of others, while being completely candid about themselves, was based on moral scruples against informing on the past conduct or associations of others. Petitioner's protests invited explanation; in lieu of explanation, petitioner was told that such matters were exclusively the prerogative of the committee to determine.

### II.

Regardless of whether it be determined that petitioner correctly made an objection on the grounds of pertinency, the requirement that a witness be informed as to the subject matter and the requirement that such subject matter be related to a valid legislative purpose exists independently of objection by him. The requirement that there be a subject under inquiry and that the questions be pertinent thereto is an essential element of the crime, since it is an element set forth in the statute under which petitioner has been convicted. The requirement that this subject appear

to the witness with indisputable clarity is established by the decision of this Court in the *Watkins* case which also enunciated the concept of jurisdictional pertinency.

In the sense that, during the course of the hearing petitioner naturally became aware of the fact that the questions all dealt with some aspect of Communism on the campus at Cornell, he was informed, but if this concept of knowledge of subject matter suffices, the requirement is nullified since, presumably, any question has a subject and a series of questions may have a common subject. But the petitioner answered all of the questions about this subject except for the revelation of names of certain individuals and he remained totally uninformed as to what subject of inquiry rendered these names pertinent.

It is common to all three cases (*Watkins, Barenblatt* and *Deutch*) that the authorizing resolution of this particular committee is not helpful because of its vagueness and breadth. In petitioner's case there were no other witnesses present and no general statement by anyone of the purpose of the particular subcommittee (which appears to have been convened *ad hoc* to hear petitioner only).

The opening statement of subcommittee counsel stated that the committee wanted to ask petitioner questions about *his* activity in a Communist Party group on the campus at Cornell and petitioner, of course, testified fully on this subject.

The avenue of information by way of response to a witness's objections was foreclosed when his protests were rebuffed.

In viewing the question of subject matter and the pertinency of the questions thereto, it must be constantly borne in mind that petitioner was indicted and convicted only for refusal to answer four questions requiring the names of other people. He was not indicted, and could not have been since he answered fully, for refusing to tell about the nature and extent of the Communist group on the campus at Cornell.

## III.

At trial, the government proved, to the satisfaction of the trier of fact, that the subject under inquiry was Communist activities in the Albany area and/or Communism in the field of labor. There is nothing in the record, either in the documentary evidence (consisting of excerpts from committee documents) or in the testimony of the sole witness, which tends to prove that the subject was the identity of Communists at Cornell or even Communism on the campus at Cornell and, in fact, there was government evidence that the subject was not Communism in education. At petitioner's hearing neither Albany nor labor were ever referred to, but the government is irrevocably committed to those subjects, having proved them at trial. The proving of a subject under inquiry being an inherent requirement of conviction under 2 U. S. C., sec. 192, the conviction must be reversed if no question asked of petitioner related to the subjects proved at trial.

A glance at the four questions in the indictment upon which petitioner was convicted shows they have nothing to do with either Albany or labor. Having proved one subject at trial, the government cannot for the first time on appeal elect a different subject. Yet for the first time, on appeal in the Court of Appeals, in its second brief, the government took the position that the subject was "Communism at Cornell". This petitioner had no opportunity at trial to refute this factual assertion, since the government did not make it at trial and was at pains to negate the idea that the subject was Communism in education. Due process requires that the defendant have an opportunity at trial to meet each essential element of the crime.

## IV.

No case hitherto before this court has sustained a conviction under 2 U. S. C., sec. 192 where the recusancy of the witness was solely confined to the identity of others. It is not contended that names may never be related to a

valid legislative purpose. It is contended that where the investigation concerns a purported political movement and, as such, is permitted to compel disclosure in spite of the First Amendment only because of the violently revolutionary tenets of the movement, the data needed by Congress is supplied when the witness fully discloses every aspect of the movement except identity.

Under such circumstances the names of individuals, per se, cannot constitute data which the Congress needs in order to legislate intelligently concerning the Communist threat.

## V.

In the *Barenblatt* case, this Court held that where First Amendment rights of the defendant were asserted to bar interrogation (and hence conviction) that "the issue always involves balancing by the courts of the competing private and public interests at stake in the particular circumstances shown". 360 U. S. at 126. Conceding that compulsory disclosure of political associations does, in fact, infringe on the First Amendment, this Court required that the judiciary weight this against the need of the Congress for certain data of use to it in framing legislation.

In this case, neither the trial court nor the Court of Appeals, however, applied the test and balanced the factors. The Court of Appeals relied solely on the rationale of *Barsky v. United States*, 167 F. 2d 241, cert. denied 334 U. S. 843 (1948) holding that the names of other people were not beyond the power of a committee to elicit. Petitioner does not contend that they necessarily are, although no conviction for contempt of Congress has thus far been upheld by this Court where the refusal to answer was solely as to the names of other people.

It is petitioner's contention that affirmance of conviction in this case involves judicial sanction in favor of the investigative power and in derogation of the protection of the First Amendment to a degree which exceeds this Court's decision in the *Barenblatt* case.

Superficially there are similarities in that both petitioner and Barenblatt were questioned largely about Communist activities on a college campus. On the other hand, there are distinct differences. If the weight on one-half of the scale—the public interest side—in turn depends upon the need for Congress to know, there is a distinct and great difference. Barenblatt refused to answer the initial questions as to his own present or past membership in the Party and therefore, naturally, foreclosed from the committee information about the nature, purposes, methods, means of operating, size, etc., of the campus group. Deutch answered fully and freely on all of these subjects. It can be fairly said that he gave the committee a picture of the group as he knew it. This reduces the data withheld to one of mere identity of others. While not contending that such identification, per se, can never be elicited, it is nonetheless argued that the identity of others is one step more remote from the type of data which the Congress (distinct perhaps from the investigative agencies of the executive branch) needs to know.

The "core" legitimizing compulsory disclosure of what otherwise would be a First Amendment-protected political association has been held by this Court to be the advocacy by the Communist Party of violent overthrow.

If it is the violent revolutionary aspects of the Communist Party which justifies compulsory disclosure which would not be permissible were this feature absent, what is the situation where at the hearing itself, this aspect of a particular Communist group is freely discussed by the witness to the full extent that the committee desires to interrogate him? The need to know concerning this "core" has been satisfied and the identity of others is peripheral and tangential.

## ARGUMENT.

### I.

### The Subject Under Inquiry by the Subcommittee Did Not Appear to Petitioner With Indisputable Clarity at the Time of His Appearance.

A. *The state of the petitioner's knowledge of the subject as it existed at the time of the hearing.*

Petitioner's hearing was held in an office before then unidentified men. He was not present when other witnesses testified. He was given no statement of the committee's purpose or area of inquiry. He was not aware of what statements other subcommittees might have made on other occasions. He had a subpoena in his hand which merely told him to appear at a certain time and place. He was sworn and the questioning commenced. After the preliminaries of identification and educational background, committee counsel made the following statement and asked the following question:

> "MR. TAVENNER: Mr. Deutch, during hearings at Albany last week, the committee heard testimony regarding the existence of a Communist Party group or cell operating among undergraduates at Cornell University, among certain graduates at Cornell and in the city of Ithaca.
>
> "In connection with that testimony, the committee was informed that you were a member of one or more of those groups. If so, I would like to ask you certain matters relating to your activity there.
>
> "Were you a member of a group of the Communist Party at Cornell?"

Petitioner challenged the jurisdiction of the committee to ask him this question. But "under protest as to its

constitutionality" he answer "Yes. I was a member of the Communist Party" [R. 293-4].

With the sole exception of the above statement of counsel, petitioner had *no* information as to the subject matter of his hearing, although he did know from a newspaper account that he had been named as a member of the Communist Party by a certain Ross Richardson. He did not know any particulars of Richardson's testimony. Since the sole scintilla of information regarding subject matter at this point was the statement of committee counsel Tavenner, the subject should not be at all enlarged beyond the precise terms of that statement. In the sense in which subject matter was thought of in the *Watkins* case, this, of course, is no announcement of subject matter but merely a recitation, as part of a question, almost identical to that afforded Watkins at the outset of his hearing. See *Watkins v. United States,* 233 F. 2d 681 (C. A. D. C. 1956) at page 682. But assuming that committee counsel Tavenner's introduction to the question announced the subject matter of the inquiry, it announces that the subject is "certain matters relating to *your* activity there" [at Cornell]. [Italics added.] Petitioner was not indicted for refusing to answer any questions on that subject, having answered as to his own activities.

It would be ludicrous to contend that, as the hearing progressed, the witness would not have gleaned a comprehension that since all of the questions related to the Communists at Cornell, the committee must have been interested in Communist activities on the Cornell campus. But this again is, in effect, to read out of the statute the requirement of pertinency and subject matter and to negate the *Watkins* decision, since any rationally conducted interrogation will have a subject in this sense of the word.

Following the witness's affirmative answer as to his membership, committee counsel stated:

> "MR. TAVENNER: The committee was advised that a witness by the name of Ross Richardson has stated that you acted as liaison between a Communist Party group

on the campus and a member of the faculty at Cornell, and that you knew the name of the member of that faculty, who was a member of the Communist Party." [R. 294]

Deutch refused to answer this question.

Here again this statement of counsel can scarcely be used to ascribe knowledge of subject matter and the pertinency of the question thereto to the petitioner since it is virtually identical to the question asked Watkins,[2] the refusal to answer which he was indicted and his conviction reversed by this Court.

It is not disputed, therefore, that at the time petitioner had to elect whether to refuse to answer or to give the names of his campus associates he had available to him no information of purpose, subject matter or pertinency of the questions thereto other than the material contained in the questions of committee counsel Tavenner, reproduced above in its entirety. *He did not know of any general course of inquiry on the part of the committee. He did not know of any statements made by committee chairmen at other times or places. He did not know of the testimony of witnesses who proceeded him, if any.*

*B. Comparison of the extent of petitioner's knowledge of subject matter with that of Watkins and Barenblatt.*

In affirming the conviction of Barenblatt [*Barenblatt v. United States*, 360 U. S. 109 (1959)], this Court did not consider the validity of Barenblatt's conviction on the counts of that indictment which sought to compel disclosure by him of the names of others. Barenblatt's conviction was

2. The following question was asked Watkins as the initial question of the series which he refused to answer:

"MR. KUNZIG: Now, I have here a list of names of people, all of whom were identified as Communist Party members by Mr. Rumsey during his recent testimony in Chicago. I am asking you first whether you know these people. My first question: Warner Betterson?" 233 F.2d at 682.

affirmed solely on the basis of three counts which inquired of his own involvement in the Communist Party.

In considering the extent of knowledge of subject matter which was, or should have been, known to Barenblatt, this Court, at page 124 of the opinion, stated that pertinency had been made to appear clearly to Barenblatt because of his becoming apprised of the topic under inquiry via "the other sources of this information which we recognized in *Watkins, supra*, at 209-215, . . ." These sources are five in number as delineated in the *Watkins* opinion. In each such category petitioner was either on an equal footing with Watkins or Barenblatt or had less information.

We will make a comparison using the five sources from the *Watkins* opinion:

1. The first such possible source by which a witness before a Congressional Committee may be apprised of the topic under inquiry is the authorizing resolution of the committee itself. It has been agreed by the government and held by the *Watkins* decision that in the cases of the Committee on Un-American Activities, the authorizing resolution, because of the extreme breadth and vagueness of its language, does not serve this function. Rather, as *Watkins* stated, the problem is one of "distilling that single topic from the broad field . . .", 354 U. S. 178, at page 209.

2. The second of the avenues by which the witness may be apprised of the subject under inquiry is the "opening statement by the committee chairman at the outset of the hearing". Both Watkins and Barenblatt had the advantage of an opening statement. Deutch did not.[3]

3. The government introduced at trial (over objection) a number of opening statements of a number of chairmen of other subcommittees, made in other cities, at other times, and the government repeatedly referred to these statements in their briefs in the lower courts. As will be more fully developed below, these statements tend, if anything, to establish subjects alien to questions which petitioner refused to answer, but for the purpose of this portion of the argument, it is sufficient to emphasize that none of these statements were available to the petitioner at the time of his hearing and he was ignorant of their contents and of the fact that they had been made.

In the case of *Watkins*, this Court decided that that opening statement, although it specifically referred to a bill which would amend the National Security Act of 1950 so as to deny to labor organizations found to be Communist-controlled the use of the National Labor Relations Board,[4] nevertheless, did not give "guidance" as to subject matter and did not inform Watkins sufficiently,—this in spite of the fact that Watkins, of course, knew that he was a labor leader and had been named as a Communist.

In *Barenblatt*, there was also a statement of the chairman of the subcommittee as to the scope of the day's hearings.

3. The third source mentioned in the *Watkins* opinion through which the question under inquiry may be ascertained is the action of the full committee that authorized the creation of the subcommittee before which a particular witness has appeared. We are in a similar situation here as in the Watkins case, since the authorization was the same, i.e., merely a general resolution empowering the creation of a subcommittee to act for the committee.

4. The fourth source, according to the *Watkins* decision, "are the witnesses who preceded and followed the petitioner before the subcommittee". The record shows that no other witnesses were ever heard by this particular subcommittee. The various other proceedings which have been referred to by the government were in each instance before other differently composed subcommittees.[5] But even if this particular

4. See footnote 49 of the opinion of this Court in *Watkins v. United States*.

5. The Deutch subcommittee, appointed for "the purpose of taking this testimony this morning," consisted of Chairman Jackson and Representatives Scherer and Doyle [R. 292].

The subcommittee which sat at the hearing in Albany which constitutes government's Exhibit No. 1, consisted of Representative Kearney as Chairman and Representative Scherer as a member.

The subcommittee which sat in Chicago, and whose proceedings are represented by government's Exhibit No. 2, consisted of Repre-

subcommittee on some occasion heard witnesses, petitioner was not present and had no way of knowing of such proceedings. By contrast, both Watkins and Barenblatt were present during the testimony of other witnesses.

In briefs previously filed, the government has contended that petitioner was aware of the previous testimony of Ross Richardson naming him as a Communist and describing Communist activities at Cornell and in New York state, and on page 6 of the government's Brief in Opposition to the Petition for a Writ of Certiorari a similar suggestion is made. It is hardly determinative of the question of the petitioner's knowledge of the topic under inquiry, but the fact of the matter is that petitioner only knew via a newspaper report that Richardson had named him as a Communist at Cornell. Petitioner appeared about a week after Richardson and there was no transcript of Richardson's testimony available to anyone outside of the committee at this time. In fact, counsel did not obtain it until some months later after petitioner had been indicted.

The government also refers frequently to the testimony of one Marqusee [R. 273] (introduced over objection) and the testimony of Owen (not of record) to establish the connection between Communism in the field of labor and Cornell campus. But again petitioner knew nothing of the testimony of these men or even that they had testified; and, furthermore, Marqusee was never referred to at petitioner's hearing and Owen was referred to only in the cryptic question "were you acquainted with Homer Owen?"

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sentative Velde as Chairman and Representatives Scherer and Moulder as members.

The subcommittee which sat in Albany on April 7, 1954, and whose proceedings are represented by government's Exhibit No. 3, consisted of Representative Kearney, Chairman, and Representatives Scherer and Walter as members.

The subcommittee which heard the testimony of Richardson, the proceedings of which are represented by government's Exhibit No. 4, consisted of Representatives Scherer as Chairman and Representative Kearney as member.

Therefore, the petitioner had no means of knowing the topic under inquiry by reason of preceding or following witnesses.

5. The fifth and final source of evidence as to the question under inquiry is the response of a member of the committee to an objection on pertinency. In the *Watkins* case, the chairman's response was not held to furnish Watkins with adequate information. It was as follows:

> "This committee is set up by the House of Representatives to investigate subversion and subversive propaganda and to report to the House of Representatives for the purpose of remedial legislation.
>
> "The House of Representatives has by a very clear majority, a very large majority, directed us to engage in that type of work, and so we do, as a committee of the House of Representatives, have the authority, the jurisdiction, to ask you concerning your activities in the Communist Party, concerning your knowledge of any other persons who are members of the Communist Party or who have been members of the Communist Party, and so, Mr. Watkins, you are directed to answer the question propounded to you by counsel." (p. 683)

The response of a committee member to petitioner's protest was:

> "MR. DOYLE: Now manifestly our counsel, in asking you the name, etc., goes into the extent of the existence of the Communist cell, don't you see? All Communist activities. I wanted to emphasize that to you because you were referring to Public Law 601 and relying on that in your statement which you read. So I can come right back to you and ask, or call to your attention the fact that under our Congress we have the duty or we are charged with looking into the extent, you see, which the Communist Party has acted. Therefore, you see I

am calling your attention to the fact that this question goes into the extent. I just wanted to call that to your attention, just in case you didn't realize the kind of question that was."

"MR. DEUTCH: Yes, I see. The only thing I am saying, sir, my challenge is, is it constitutional under Public Law 601?"[6] [R. 295-6]

It would seem to be little to choose between the two. The record shows that petitioner in this case lacked several of the sources of information as to the subject matter or the topic under inquiry, that is, that "single topic from a broad field" of Communism which the *Watkins* decision requires and he was, therefore, in a less advantageous position to make the choice that he was forced to make at the time of his hearing than either Watkins or Barenblatt.

*C. It is not required that any particular form of words be used by a witness in raising the question of pertinency.*

The government has contended, and the Court of Appeals agreed, that the entire question concerning the purpose, scope and subject of the inquiry turns on whether or not petitioner at the time of his hearing objected on the grounds of pertinency. To this there are two answers: petitioner objected on these grounds to as great an extent as did Watkins and, more important, the necessity that a witness be informed as to subject matter exists independently of specific objection by him and is more far-reaching and subtle a requirement than a mere awareness of a common thread in the questioning.

It has become, or is in the process of becoming, an accepted fact that Watkins specifically made objection to the

6. Counsel was puzzled by petitioner's reference to "Public Law 601". After the hearing, Petitioner pointed out to counsel that the subpoena states that appearance is required before the Committee on Un-American Activities established pursuant to Public Law 601.

pertinency of the questions which he refused to answer. Actually, the record in the *Watkins* case shows that the word "pertinency" was never spoken by him and his objection was, in toto, strikingly similar to that of petitioner. It was based mainly upon his refusal to inform on others. Watkins' statement was as follows:

> "MR. WATKINS: Mr. Chairman, in regard to that question, I would like to make a very brief statement I prepared in anticipation of this answer.
>
> "MR. VELDE: You may proceed.
>
> "MR. WATKINS: Thank you. I would like to get one thing perfectly clear, Mr. Chairman. I am not going to plead the fifth amendment, but I refuse to answer certain questions that I believe are outside the proper scope of your committee's activities. I will answer any questions which this committee puts to me about myself. I will also answer questions about those persons whom I knew to be members of the Communist Party *and whom I believe still are.* I will not, however, answer any questions with respect to others with whom I associated in the past. I do not believe that any law in this country requires me to testify about persons who may in the past have been Communist Party members or otherwise engaged in Communist Party activity *but who to my best knowledge and belief have long since removed themselves from the Communist movement.*
>
> "I do not believe that such questions are relevant to the work of this committee nor do I believe that this committee has the right to undertake the public exposure of persons because of their past activities. I may be wrong, and the committee may have this power, but until and unless a court of law so holds and directs me to answer, I most firmly refuse to discuss the political activities of my past associates." [233 F. 2d 682, at page 683.]

The foregoing constitutes Watkins entire objection. The gist is a statement of unwillingness to inform on others.

Is there any significant difference between this statement (which was designated by this Court in *Barenblatt* as "a specific objection . . . on the ground of pertinency") and petitioner's moral scruples about informing together with his challenge of the jurisdiction of the committee and the constitutionality of the proceedings, particularly when read in the light of his colloquy with Representative Jackson, discussed below?

The Court of Appeals opinion relies on the fact that "pertinency" and "unawareness of the subject" were not raised by petitioner until trial in the District Court [R. 338]. But in the *Watkins* case the pertinency point and unawareness of the subject matter was *not even argued in Watkins' Brief filed in this Court. Watkins v. United States,* No. 261, Brief for Petitioner, Index, Argument, p. 24, *et seq.*

It is repeated that petitioner does not contend that the course of the questions did not reveal the fact that they revolved around the Communists on the Cornell campus. But petitioner answered all these questions. He refused to answer, and was indicted, only in connection with a few questions seeking the names of his associates. And what petitioner did not and could not know, and what we do not know to this day is the pertinency of *these* questions to the subject of Communism at Cornell (if that was the subject under inquiry), or the subject of labor and/or the Albany area if, as the government contended at trial, that is the subject.

It is in this sense that the topic is obscure.

### D. *Petitioner sought to be advised of the significance of the questions and his duty to answer.*

The essence, after all, of the requirement that the subject and the pertinency of the questions be clear is one of due process. It is founded upon the concept that the stat-

ute (2 U. S. C. § 192) does not punish any and all refusals to answer but only refusals to answer questions "pertinent to the subject under inquiry". That the questions be so pertinent is an element of the crime. This being so, it it follows that fundamental fairness demands that the witness, at the moment at which he must decide whether the law requires him to respond to that which (for reasons which are, in our scale of values, honorable) he is strongly motivated not to respond, be aware of how the facts sought to be elicited of him pertain to a subject into which Congress can legitimately inquire by compulsion of law.

Thus this Court, in the *Watkins* case, said:

> "Plainly these committees are restricted to the missions delegated to them, i.e., to acquire certain data to be used by the House or the Senate in coping with a problem that falls within the legislative sphere. No witness can be compelled to make disclosures on matters outside that area. This is a jurisdictional concept of pertinency drawn from the nature of a Congressional committee's source of authority. It is not wholly different from nor unrelated to the element of pertinency embodied in the criminal statute under which petitioner was prosecuted." 354 U. S. at 206.

*This* kind of pertinency is an inherent requirement. It does not have to be raised. But it was raised by petitioner, albeit clumsily, at the hearing in a colloquy with Representative Jackson. Deutch, having told about himself, refused to give the name of the member of the faculty who had left the Communist Party, saying:

> "MR. DEUTCH: Sir, I am perfectly willing to tell about my own activities, but do you feel I should trade my moral scruples by informing on someone else?
>
> "MR. JACKSON: Let the Chair say that moral scruples on your part do not constitute a legal reason for declining to answer the question, and you are directed to answer the question.

"MR. DEUTCH: At this time I do think so, sir, because I had certain ideas and people I came in contact with had certain ideas. I didn't believe in force or violence, or anything like that.

"MR. JACKSON: That is entirely beside the point. You have been asked a question and we must insist that you answer the question or decline to answer it, and your declination must consist of something more than your moral scruples.

"MR. DEUTCH: As to details of that, I think the whole question has been magnified more than it should have.

"MR. JACKSON: There is a question pending and the Chair must insist that you answer the question that has been asked."

* * *

"MR. JACKSON: You therefore refuse to answer the question that is pending, is that correct?

"MR. DEUTCH: Yes, sir, but I could amplify that point. I do not mean the point of contempt. I think—I happen to have been a graduate student—the only one there, and the organization is completely defunct, and the individual you are interested in wasn't even a professor. The magnitude of this is really beyond reason.

"MR. JACKSON: That decision does not rest with you as to whether or not the scope of this inquiry—as to whether or not certain individuals are important now or not. That is the responsibility of we Representatives to determine. That determination cannot rest with you. It may be very true that the individual to whom you have referred is no longer a member of the Communist Party. However, that is a supposition on your part—and a supposition which the committee cannot accept.

"Again I direct you to answer the question."

A fair reading of these protests of petitioner is, in effect, that in view of the insignificance of the group, the insistence of the committee amounted to the collection of past minutiae, which the *Watkins* opinion characterized as leading to "exposure of private lives in order to gather data that is neither desired by the Congress nor useful to it." Counsel might have put it in the form of a request to be informed of how the information sought related to data needed by the Congress, but it must be remembered that the committee *does not permit counsel to speak.* (Counsel cannot make objections, but is confined by committee practice to whispered sotto voce conferences with the witness and then only if the witness initiates the conference.)

The committee chairman understood this as having raised such a question and it is contended that petitioner was entitled to at least some information. The response, however, was to the effect that he was not entitled to be further enlightened:

> "That decision does not rest with you as to whether or not the scope of this inquiry—as to whether or not certain individuals are important now or not. That is the responsibility of we representatives to determine. That determination cannot rest with you."

There is no doubt that the witness, and probably also his counsel, was groping, but there is also no doubt that he sought some enlightenment beyond the obvious fact that the committee was asking questions about the activities on the Cornell campus. The youth and extreme nervousness of the witness and the fact that the hearing was an isolated event unconnected with any course of inquiry (other than that the witness had been named as a Communist) required that some explanation be afforded the witness if he were expected to make the hard choice of going beyond complete candor as to himself by giving the names of others.

**II. The Government Is Committed to the Subject Proved at Trial and Conviction Cannot Be Sustained If This Subject Was Either Untouched Upon at the Hearing or Unknown to Petitioner and It Is Too Late on Appeal for the Government or the Courts to Construe a Subject Other Than That Proved at Trial.**

The Government has steadily insisted that the subject appeared to petitioner with indisputable clarity and yet during the course of this case the government has nominated a number of different subjects. The trial judge in his opinion gave still a different version and the Court of Appeals nowhere in its opinion states what, in its view, the subject was.

A. *The Government's evidence at trial tended entirely to establish that the subject was Communist activities in the Albany area and/or Communism in the field of labor, and there was evidence introduced by the Government that the subject was not Communism in education.*

The transcript of petitioner's hearing before the subcommittee is devoid of any material concerning infiltration into labor or the Albany area. The committee print of petitioner's testimony bore the title, "Communist Methods of Infiltration—Education—Part 8". The opening statement of government counsel [N. T. 3-14] commenced as follows:

> "Mr. Hitz: Your Honor, this defendant is named Bernhard Deutch. He was called before the Un-American Activities Committee here in Washington on April 12, 1954 in an investigation for legislative purposes which was being made by that committee; in this instance, particularly with reference to the geographical location of Albany, New York, and cities thereabouts." [N. T. 3-4]

The government's opening went on to describe the Albany hearings and the infiltration by the Communist Party of the industrial plants and labor unions (not touched upon at

Deutch's hearing) and then described the testimony of a man named Marqusee who had been in the School of Industrial and Labor Relations at Cornell (neither Marqusee nor the School was referred to in Deutch's hearing). Counsel then discussed the Labor Youth League and Marqusee's membership in it. (Labor Youth League was not referred to at the Deutch hearing.) Counsel then spoke of factories in Binghamton (not adverted to in petitioner's hearing) whereupon the Court inquired:

> "THE COURT: I was just wondering whether all of these ramifications are necessary for the purpose of this case?"

To this government counsel replied that they would like to offer them in evidence and went on to talk about the General Electric plant at Syracuse, the International U. E., the Communist dominated U. E. and then stated [N. T. 9]:

> "These matters had interest for the committee not only in the general area, which was sufficient, of course, to show Communist infiltration, but also to show in the field of labor and in the field of education that there was (sic) the dangers that Communist conspiracy had to suggest."[7]

The government then proceeded to offer (over objection on the grounds of relevancy) government's Exhibit No. 1 consisting of pages 2361 and 2363 of a document published by the Committee entitled "Investigation of Communist Activities in the Albany Area—Part I."[8]

Government's Exhibit 1 consisted of a statement by the chairman of another subcommittee of the House Committee on Un-American Activities made in Albany, New York,

7. It is the above statement which the government in footnote 11 to their Brief in Opposition to the Petition for a Writ of Certiorari relies upon to contend that the Government's opening statement at the trial included education as a matter of interest to the committee.

8. All of this document was erroneously printed. The portion constituting government's Exhibit 1 in its entirety appears on pages 38-40 of the record.

a little prior to petitioner's hearing. There is no mention of education or Cornell in the statement of the purpose of the hearing; the subcommittee chairman stated [R. 39] that the investigation was concerned with "Communist Party activities within the Albany area".

Petitioner's counsel objected on the grounds that there was nothing in the petitioner's hearing having to do with the Albany area [9] and the document was therefore irrelevant. This objection was overruled.

The government then introduced into evidence government's Exhibit No. 2 consisting of pages 4165 and 4166 of a document printed by the committee entitled "Investigation of Communist Activities in the Chicago area—Part I." [10]

Over defense objection this document was admitted to establish the purpose and subject matter of petitioner's hearing. The admitted portion consists of a statement of the chairman of a subcommittee, other than that which heard petitioner, made at hearings held in Chicago. There is no mention in the chairman's statement of education or Cornell. It so happens that government's Exhibit No. 2 is the same exhibit introduced by the government in the *Watkins* case to prove that the subject of that hearing was infiltration into labor. It does so prove.[11] How is it possible for the

9. The government in the Court of Appeals at one point half-heartedly argued that Cornell was in the Albany area. We feel assured that it will be conceded that Ithaca, just to the west of the middle of the state, is closer to Lake Erie than to the Hudson and not economically, culturally or geographically a part of the industrial valley section of Albany, Schenectady and Troy, which lies 150 miles to the east.

10. The entire document was erroneously printed in the record; the only portion admitted in evidence is that which appears on pages 192-194 of the record.

11. It is interesting to note that the Court of Appeals in its opinion in *Watkins v. United States*, 233 F. 2d 681, found, on the basis of this same exhibit, that "the purpose of the Committee's hearing was to aid it [the Committee] in its study of a proposed amendment to the Internal Security Act of 1950 . . . it made unavailable to labor unions found to be Communist-infiltrated, procedures established in the Labor-Management Relations Act of 1947 . . ." (p. 686)

same statement of purpose to be applicable to two hearings as different in content as that of Watkins and that of Deutch? The chairman's statement which constitutes government's Exhibit 2 is entirely concerned with infiltration in labor, particularly in the Chicago and mid-western area of the United States. It was admitted to show the purpose of Deutch's hearing although nothing in this hearing even touched upon any such matters.

The government then immediately introduced government's Exhibit No. 3, again over defense objection, consisting of the opening statement of the chairman of a subcommittee of the House Committee on Un-American Activities made in Albany, New York, on April 7, 1954 [R. 270-273] and the testimony of one John Marqusee [R. 273-281]. The statement is that of a chairman of a subcommittee other than the subcommittee who heard the petitioner. After reviewing the results of the hearings held the year before in Albany and the fact that they resulted in the resignation of a member of the Federal Mediation and Conciliation Service, the subcommittee chairman's statement was that the committee "is investigating Communism within the field of labor where it has substantial evidence that it exists" [R. 272]. Nowhere in the chairman's statement on the subject under inquiry is there any mention of education or Cornell.

The testimony of Mr. Marqusee [R. 273-281] is concerned largely with the U. E. and the infiltration of that union and others mostly in and about Schenectady. Marqusee did say that he had become connected with the U. E. by reason of having been in the School of Industrial and Labor Relations at Cornell University. Mr. Marqusee did not mention the petitioner and at petitioner's hearing no mention was made of Mr. Marqusee or the School of Industrial and Labor Relations at Cornell or any other matter touched upon in Mr. Marqusee's testimony. The petitioner, of course, was ignorant of Mr. Marqusee's testimony and the fact that he testified and did not know him.

The government then introduced government's Exhibit No. 4 consisting of excerpts from the testimony of Emanuel Ross Richardson [R. 282-290]. Richardson was an employee of the FBI and the superior in the Communist Party of the petitioner. Only a portion of Richardson's testimony is printed in the record. His full testimony occupies thirty pages of committee print. The subcommittee who heard Richardson was not the same subcommittee that heard the petitioner. Richardson named Deutch as a member of the Communist Party. He also testified widely about Communist activities in New York State but did not connect petitioner with any of them, solely confining his identification of petitioner as a student at Cornell and alleging that he, Deutch, knew of a faculty member who was a Communist.

As will be seen from the record of Richardson's testimony he did not state that this faculty member was to his knowledge no longer a member of the Communist Party. During his hearing Deutch, having read in the newspaper that Richardson had testified, stated to the committee that they must know from Richardson's testimony that the faculty member was no longer a member of the Communist Party since Deutch knew that he had told Richardson this at a time when Richardson was the "Communist" to whom Deutch paid his Party dues. Actually Richardson had not mentioned this fact in his testimony. Petitioner never had an opportunity to hear Richardson's testimony or read his testimony. The government has repeatedly contended that petitioner was familiar with Richardson's testimony and therefore via this testimony was aware of the purpose of his own hearing. Actually, petitioner's remark establishes that he was *not* familiar with Richardson's testimony, he knew only that Richardson had named him as a member of the Party and this information was entirely via a passing reference in a news account.

Government's Exhibit No. 5 is the testimony of petitioner himself. The government's Exhibts Nos. 6 and 7 are

lengthy summaries of the work of the Committee entitled *Annual Report for 1953 and 1954.*

The government then called its only witness, Committee counsel Tavenner. His testimony in its entirety appears in the record, pages 11 to 27, inclusive. At the outset government counsel invited Mr. Tavenner's attention to the fact that the exhibits of other hearings introduced by the government in evidence (discussed above) were labeled "Albany", whereas, the title on the front of the committee print containing Deutch's testimony was "Education". In R. 14, this question and answer appears:

"By Mr. Hitz:

Q. How does it happen that Mr. Deutch's testimony appears in 'Education—8' if it was a part actually of 'Albany'?

A. Well, the staff in the releasing of this testimony at a later date placed it for convenience under the heading of 'Education.'

Q. What connection was there between it and the investigation entitled 'Albany, New York'?"

The witness never said what the connection was.

Rather, over objection, the witness testified [R. 14, et seq.] as to the background of the Albany hearing, the fact that petitioner was called in Washington rather than Albany but before the same subcommittee (in this the witness was in error),[12] the fact that Richardson named Deutch and mentioned the faculty member and ultimately nominated the purpose of the hearings as being *"a general investigation of Communist Party activities in what was referred to as the 'Capitol area'"* [Albany] [italics added] [R. 19]. Mr. Tavenenner did testify that it had come to the attention of the staff of the committee that some mem-

12. The record shows that the subcommittee appointed to take Deutch's testimony [R. 292], consisted of Jackson, chairman, Shefer and Doyle, members. This subcommittee did not take any other testimony in Albany, Chicago or, according to the record, anywhere else.

bers of the Industrial Relations Department at Cornell were accepting positions with some labor unions which were Communist controlled and that the Committee wanted more information about this practice [R. 24]. Whether the committee sought such information or not, the fact is that they did not seek it in petitioner's hearing since there was no mention of this subject.

Now, if the government proved anything, they proved that the subject of petitioner's hearing was Communist activities in the Albany area and the infiltration of labor unions by Communists. Although they stopped short of alleging it as the subject, they did advert to the practice by which an individual unknown to petitioner (Marqusee) had joined a Communist dominated labor union by reason of the fact that he was enrolled in the Industrial Relations School at Cornell. However, the government negated the idea that "education" was the subject by having Mr. Tavenner explain that the label on the committee print of petitioner's testimony was done by the staff purely for convenience, i.e., had no significance.

It is obvious from a merely cursory reading of the testimony of petitioner that the subjects of Albany and infiltration into labor unions were not the subject of his hearing. The particular practice related by Marqusee (the Cornell student who joined a Communist dominated labor union) does, in a remote and circumstantial sense make a purely casual connection between labor and Cornell, but still not with petitioner's hearing. He was not asked about Marqusee and he was not asked about whether or not he was familiar with this practice, if it was one. If the committee was interested in that, they could have asked him and there was no reason to suppose he would have refused to answer, and give the committee information if he had any about the Industrial Relations School so long as it did not involve names, which names the committee already had from Marqusee and Richardson as far as the Industrial Relations School was concerned. But he was asked about

no such matters and he was not even asked about the Labor Youth League, which the government states was active on the Cornell campus. Perhaps the subcommittee *could* have taken a different tack and perhaps they *could* have thus connected Deutch's hearing with the investigations of other different subcommittees re Albany and labor, but they did not.

The government in its closing argument to the trier of fact adverted to the Albany hearings, infiltration of the labor unions in that area, the Labor Youth League, Ithaca, Binghamton, Syracuse, the General Electric plant in Schenectady, and the Industrial Relations School.

In defense summation, counsel, relying on the government's own proof that the subject was Albany and labor explicitly renounced the right to make an argument which would have been appropriate if there had been proof that the subject was the identity of Communists on the campus at Cornell [N. T. 114]. The government let this stand.

The trial judge, confronted with a variance between the government's proof of subject and the fact that the questions did not touch upon Albany or labor, found that the committee was investigating the general subject of infiltration of Communism into the educational *and* labor fields [R. 32].

In the government's brief filed in the Court of Appeals, it is stated at page 1 that petitioner was called "in the course of an investigation covering Albany and the adjacent up-state New York area".

On page 2 the brief states that the trial judge found that the subcommittee was investigating the inter-relationship of infiltration into education and infiltration into labor, although there was no such statement in the opinion of the trial judge [R. 30-34].

On page 4 of the brief, the government states that the committee was interested in finding out to what extent students in the industrial and labor relations school were influenced to select Communist-controlled unions for their

summer work. (If the committee was interested in this, it is curious that they asked petitioner nothing about it.)

Finally, on page 14 of the brief, the government takes the position that it is the statements of chairmen at committee hearings prior to that of petitioner's which reflected the subject matter under inquiry, i.e., government's Exhibits 1, 2 and 3, which do not mention education but only activities in the labor area and/or infiltration into labor unions in the midwest. Nowhere in this brief is it stated that the subject was Communist activities at Cornell University.

After the filing of that brief, and prior to the decision of the Court of Appeals in this case, this Court handed down its decision in *Barenblatt v. United States*, 360 U. S. 109 (1959). Whereupon the government filed a reply brief in the Court of Appeals which, at long last, flatly stated that the subject under inquiry was Communist activities at Cornell University.

Doubtless the government avoided designating the subject as being the identity of the student members of the Communist group at Cornell out of concern lest this Court ultimately determine that under all the surrounding circumstances, a member of such a group would be protected by the First Amendment from compulsory disclosure of the names of his associates, i.e., that the balance between the need for certain data to be used by the Congress in combating the menace of Communism would be so slight in the case of a half dozen young men meeting under the paternal wing of an FBI agent as to be outweighed by the right of freedom of political association, which is admittedly infringed upon by compulsory disclosure. See *Sweezy v. New Hampshire*, 354 U. S. 234 (1957).

The *Barenblatt* decision made it clear that a college campus was not to be considered a privileged sanctuary and the government then felt free to shuck off the incubus of contrived proof that Albany or labor or the inter-relationship between labor and education was the subject thus eliminating the dilemma created by the fact that no ques-

tions were asked petitioner on these subjects, and felt free to rely on the fact that all of the questions pertained to proof of student Communists on the Cornell campus.

B. *It is the petitioner's contention that the government is bound by the proof offered at trial.*

What the government here attempts is not merely a change of *legal theory* during the course of appeal; it is an attempt to substitute proof of a material element of the crime. The statute under which petitioner was convicted does not punish any and all refusals to answer Congressional committees but only refusals where the questions are "pertinent to the subject under inquiry". Therefore, proof of the subject under inquiry is an essential element of the crime and a prerequisite to conviction, since it is otherwise logically impossible to know to what it is that the questions refused must be pertinent.

By the same token, a defendant has the right to be confronted at trial with evidence of each essential element of the crime—in this case, evidence of the subject matter. The prosecution may in the course of appeal shift its emphasis or even adopt new legal theories; it cannot argue that it could have proved at trial without difficulty an alternative version of an essential factual element. It cannot abandon a factual element of a crime proved at trial and seek to substitute another which, by hindsight, is more realistic and which in the light of later decisions now appears to them to be constitutionally less risky than it did at the time of trial.

All of the government's documentary evidence asserts the subject to be Albany and/or labor. None of it adverts to an investigation into education. The government's only witness, although his testimony in places is somewhat garbled, proved the same thing. The difficulty with this is that no questions asked Deutch touched upon the infiltration into labor or Communist activities in the Albany area, or even the inter-relationship between infiltration into labor

and into education, and such evidence, as it exists, is that the petitioner, who has never been in the Albany area and has never been connected with a labor union, has no knowledge of these fields. The government seeks to solve this difficulty by reverting to a subject which they elected to avoid at trial.

All of the varying nominations by the government at different times of what the subject was hardly serves to convince us that the subject appeared to the petitioner with undisputable clarity. The question arises which subject out of the several mentioned appeared to the witness with undisputed clarity? In this state of affairs, it makes no difference whether the witness did or did not properly raise the issue of pertinency. There nonetheless must be a subject under inquiry, which subject must be proved at trial.

Fundamental due process requires that the defendant have an opportunity at trial, before the trier of fact, to refute each and every essential, factual element of the government's case, to cross-examine and elect to take the stand or not in the light of the state of the evidence at the close of the case for the prosecution. This defendant had no opportunity at trial to refute the factual assertion now made that the subject was Cornell. Furthermore, the defense was likewise deprived of an opportunity to contest and argue whether the subject now brought forward was a legitimate subject for inquiry or that the authorized investigation *was* labor and Albany and that Cornell was a "brief excursion" of an *ad hoc* subcommittee which was not authorized by the parent committee.[13]

In fact, in argument to the trier of fact, petitioner's counsel specifically stated that he was not going to argue that Communism at Cornell or in education was not a proper subject because the government had agreed at trial that it was not the subject under inquiry [N. T. 114]. The prosecution has the last word and they let this stand.

13. As in *Sacher v. United States*, 356 U. S. 576 (1958).

After an express renunciation by defense counsel of a right to argue a question of fact (because uncontroverted at trial) can the government now urge that fact upon this Court?

The situation is analogous to that which prompted this Court to reverse the conviction in *Shepard v. United States*, 290 U. S. 96 (1933). There it was held that on a trial for murder, where the defense was suicide, a statement that the deceased had made accusing the defendant, erroneously let in evidence as a dying declaration, could not be treated on appeal as properly in the case on the theory that, as evidence of the defendant's state of mind, it could have been admitted to rebut the suicide defense. Mr. Justice Cardozo for the unanimous court pointed out that such a procedure was unfair and "the course of the trial put the defendant off his guard" (290 U. S. at 103).

Likewise, to permit the government to now put forward a different (albeit more plausible) subject is unfair because the assertion at trial of the unsupportable subjects of Albany and labor "put the defendant off his guard." Counsel, realizing that, over objection, the government was busily proving subjects not even adverted to in the hearing before the Committee, relying on a sole witness who negated a purpose of investigating education and asserted a rambling amalgam of subjects, none of which were involved in the indictment questions, naturally refrained from cross-examination. The defendant did not take the stand.

Due process demands that the prosecution be bound by trial proof of each element of the crime. Conviction cannot be sustained on appeal on the theory that the government could have proved something else at trial and, had they done so, such proof would have to be sufficient to sustain a conviction. *See Kotteakos, et al. v. United States*, 328 U. S. 750 (1946), and *United States v. Klass, et al.*, 166 F. 2d 373 (C. A. 3d, 1948).

## III. Where Witness Discloses All to a Congressional Committee Investigating Communism Except the Names of His Associates, There Is No Legislative Purpose to Be Served by Compelling the Disclosure of These Names.

No case hitherto before this court has sustained a conviction under 2 USC § 192 where the recusancy of the witness was strictly confined to the identity of others. In the two cases where this was the only information refused, *Watkins* and *United States v. Rumely*, 345 U. S. 41 (1953), this Court reversed. In *Barenblatt* this Court expressly refrained from passing upon the counts in which the questions were, in this respect, similar to those in the instant case. It is not contended that names may never be related to a valid legislative purpose. It is contended that (aside from the protection of the First Amendment) the data needed by Congress is supplied when the witness fully discloses every aspect of the political movement under investigation except identity.

In the *Watkins* case this Court said:

> "Plainly these committees are restricted to the missions delegated to them, i.e., to acquire certain data to be used by the House or the Senate in coping with a problem that falls within its legislative sphere." 354 U. S. at 206.

Very plainly the committee received the sort of information to which the court in the above statement confined them. The "legislative sphere" is the sphere of the formulation of general rules, applicable to all individuals, or all in a given class, the "certain data" necessary to intelligently formulate such rules is naturally that pertaining to quality and quantity, it is data concerning the nature, purposes, aims and complexion of the problem to which legislation might be addressed. It is the *activities* not the *actors*.[14] Perhaps petitioner's disclosures about the nature

14. It is the Committee on Un-American Activities, not the Committee on Un-American Actors.

and activities of the campus group might be helpful in this respect. If more had been desired along these lines further questions could have been asked.

On the other hand, it is rare indeed that identity of individuals will be necessary, or even useful in the process of legislation. There are exceptions of course, the most obvious where legislative investigations are concerning themselves with the operations of the government itself. But where the investigation, legitimate as it may be, necessarily involves the interrogation of private citizens as to affairs which are classically *political*, it will be rare indeed that the identity of individuals will be such data as the Congress requires to legislate. Punitive or discriminatory legislation directed against a specific individual is barred by ancient tradition and by the Constitution as a bill of attainder.

It is fundamental in the doctrine of the separation of powers that the identification of specific individuals who may or may not be engaged in illegal activity is the exclusive concern of the legislative branch and punishment of those individuals who have been accused by the Executive Branch is exclusively the province of the Judicial Branch.

In *Barenblatt*, this Court permitted questions which sought to compel the disclosure by the *witness* of his own membership in the Communist Party. But this is a matter on a very different footing and the similarity is superficial. For without this knowledge the investigating committee is foreclosed at the outset from *any* inquiry since it would be meaningless to ask a person, who will not disclose whether or not he was a Communist and participated in Communist activities, anything further about the nature and aims of Communists. Furthermore, even if such a witness were to answer other questions the committee would have no way to evaluate the information given if they did not know whether the person relating the information had been involved himself or not. Without disclosure by a witness of

whether he was a Communist there would be no context to any further answers he might give.

Exposure for exposure's sake is conceded to be beyond the power of a committee and therefore to sustain conviction it must be determined that, for example, the name of the personal friend of Deutch's who gave him $100.00 (Count 2) is data which the Congress needs in order to legislate.[15]

Petitioner here contends that totally aside from any protection which he may be accorded under the circumstances of this case by virtue of the First Amendment, these indictment questions fail because it is not possible to discern in them a valid legislative purpose. In *Watkins* this Court required that it appear that "a particular inquiry is justified by a specific legislative need", 354 U. S. at 205.

In *Barenblatt*, this Court, quoting *McGrain v. Daugherty*, 273 U. S. 135, 160, confined the committees to "testimony needed to enable it [Congress] efficiently to exercise a legislative function belonging to it under the Constitution". What specific legislative need in order to carry out the constitutional legislative function, could possibly be fulfilled by requiring petitioner to name the Cornell student who invited him to join the Communist Party when he has already disclosed to the committee the circumstances and motivations which impelled him to join, and the nature and activities which he knew about after his joining? It would rather appear that this item of information is an example of that "probe for a depth of detail even farther removed from any basis of legislative action" by way of the collection of past minutiae which this Court warned against in the *Watkins* opinion.

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15. It is interesting to note that the question which Rumely (*United States v. Rumely*, 345 U. S. 41 (1953)), refused to answer and conviction for which was reversed by this court was virtually identical to the question comprising count No. 2 of the petitioner's conviction. Rumely was asked the name of a lady from Toledo who gave him $100.00 to further Rumely's political activities and Deutch was asked the source of the $100.00 which he received to further his political activity.

## IV. Sustaining Conviction of Petitioner in This Case Requires a Greater Constriction of the Protection of the First Amendment as Balanced Against the Need of the Congress for Information Than in Any Preceding Case.

Contention that Congressional hearings involving the investigation of Communism violate the First Amendment rights of witnesses by forcing disclosure of political associations has been made in a number of cases. This Court has declined to accept the proposition that this is necessarily so in every instance and has, rather, on the one hand, recognized that such compulsory disclosures infringed upon the First Amendment while on the other hand reserving the question of whether or not such infringement is a permissible one, this to be decided in the light of the circumstances of the particular case.

Petitioner does not intend to here argue what might be called the *absolute* First Amendment position and accepts for the purposes of this case the *relative* position enunciated most clearly in the *Barenblatt* case. Nor would petitioner presume to catechise this Court on the transcendent importance of First Amendment rights. But it is pertinent to emphasize, nevertheless, the very material derogation of the right of free and unfettered association in unorthodox and heretical movements which is brought about by the compulsory disclosure of such activities before Congressional committees.

The larger interests here at stake transcend those of petitioner, himself, it being vital to the vigor of a free society, that even the most extreme fringes of political thought be accorded First Amendment protection. This is particularly true of a student.[16] Nevertheless, this Court, commencing with *American Communications Assn. v. Dowds*, 339 U. S. 382 (1950), has applied special standards

16. "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U. S. 234 at 250.

in the case of members of the Communist Party. Without exception, the rationale for these decisions was the fact that along with political tenets that were merely unorthodox, the Communist Party had also the tenet of violent overthrow of the government and that there were reaches of the Communist Party in which political activity blended into a conspiracy. It is certainly now common knowledge, however, that each and every person who passed through membership in the Communist Party was not necessarily committed to such belief or action and may not necessarily ever have been exposed to such tenets in the Communist Party.[17]

This Court has itself recognized and distinguished between the leaders of the Party nationally and casual short-time, rank and file members. See *Konigsberg v. State Bar of California, et al.*, 353 U. S. 252 (1957). From the outset of this case in 1954, petitioner has urged his First Amendment rights in the *relative* sense. Petitioner's Motion to Dismiss, filed February 11, 1955 [R. 9], raised this point and

17. It has been estimated that, although the total strength of the Party at no one time ever exceeded 75,000, over 700,000 people went *through* the Communist Party. See *Report on the American Communist*, Ernst and Loth (Holt 1952). The phenomena of transitory membership in the Communist Party during extreme youth, followed by disillusionment, is not an uncommon one and it is difficult to perceive such connection between this kind of membership and national security as justifies infringement of the First Amendment. See *The Witness*, Whitaker Chambers (Random House 1952), p. 12: "Now, by ex-Communists do I mean those thousands who continually drift into the Communist Party and out again. The turnover is vast."

As is concluded by Krugman in the *Appeal of Communism to American Middle-Class Intellectuals and Trade Unionists*, 16 Public Opinion Quarterly, No. 3, p. 331, the Communist Party is, on the whole, well equipped to develop, in the course of time, hostility and conformance in its members but it loses members in the process. As was testified to, for the prosecution, by John Lautner, former member of the National Review Commission of the Communist Party and a Party professional for twenty-five years, in *U. S. v. Fujimoto*, 102 F. Supp. 890 (D. C. Hawaii, 1952), N. T. p. 5162: "The Party was like a barn door, they were coming in and going out. As soon as new members found what the Party was they left. Year in and year out there was almost a hundred—well, a large percentage of turnover in the Party."

the brief filed in support thereof argued that the infringement of petitioner's First Amendment rights inherent in the proceedings before the committee could not be justified because of the lack of a reasonable relation between the area of petitioner's knowledge and information and the national security and that these factors must be weighed in each case.[18]

In the *Watkins* decision (354 U. S. at 205), the Court spoke of the need "to strike a balance between the public need for a particular interrogation and the right of citizens to carry on their affairs free from unnecessary governmental interference". There the Court adverted to the fact that "the government contends that the public interest at the core of the investigations of the Un-American Activities Committee is the need by the Congress to be informed of efforts to overthrow the government by force and violence so that adequate legislative safeguards can be erected". Petitioner accepts this justification as the law of this case.

This concept was further refined and made more explicit by the majority opinion in the *Barenblatt* case, where it was stated:

> "The Court's past cases establish sure guides to decision. Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships. However, the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances. Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a

18. Only because the government's brief in opposition to a Petition for Writ of Certiorari (p. 13) argues that the First Amendment is not applicable in this case because the petitioner failed to rely on it in refusing to answer questions, do we point out the obvious fact that the First Amendment is a restraint on government action, not a personal privilege which must be invoked like the privilege against self-incrimination of the Fifth Amendment. No American has to "plead" the First Amendment.

balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." [360 U. S. at 126]

Petitioner submits his case to the balancing test established above. Petitioner earnestly contends that if, as stated above, "the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships" that he is preeminently eligible for qualification under this principle, and to hold otherwise is tantamount to holding that the principle can never apply in an inquiry concerning Communism. Although this Court, as noted above, has recognized the peculiar position of Communists, it has never gone so far as to create for all of those who ever, under any and all circumstances, were members of the Communist Party a special constitutional category. To do so would place a not insubstantial class of citizens in the category of constitutional outlaws. It must, therefore, be assumed that "the First Amendment in some circumstances protects an 'ex-Communist' from being compelled to disclose his associational relationships" and, if this be so, it is difficult to conceive of circumstances in which the First Amendment protection should be applied against the investigative power if it is not to be applied in this case.

Here we have the typical youthful, transitory, even naive, rank and file member, whose negation of any knowledge of the core of violence is uncontradicted and who apparently never got sufficiently into the Party councils to find out where the local headquarters were and all of whose activities were under the constant scrutiny of the FBI, whose agent was his superior, collected his dues, drove him to Party meetings and, when there were no other revolutionaries left, met him alone. If, in such a case, full disclosure of these campus capers to the investigators does not sufficiently satisfy the accomodation due the investigative power and the First Amendment does not begin to assert itself, there would seem to be no limit in terms of

minutiae which may not be compulsorily elicited so long as the investigation concerns Communism.

Where this Court has justified invasion of First Amendment rights in instances involving Communists it has been solely because of the aspects of Communist Party doctrine which relate to violent overthrow. The difference in result between the case of *Dennis v. United States*, 341 U. S. 494 (1951), and *Yates v. United States*, 354 U. S. 298 (1957), recognizes differences in belief and action between different members of the Communist Party. In *Dennis*, it was, in effect, found that the defendants, the top leadership of the C. P. U. S. A., advocated violent overthrow of the government as speedily as circumstances would permit. In *Yates*, this Court, with respect to a second echelon of leadership, decided that the evidence established that the defendants merely advocated violent revolution as a *theory*, and that this was protected by the First Amendment.

This petitioner stated that he and his associates did not believe in (much less advocate) violent overthrow and that all they did was to have "bull sessions on Marxism and give out a leaflet or two" [R. 302]. This statement is uncontradicted although the government could have brought forward the group's leader, FBI man Richardson, if it were doubted.

Now, this Court has never placed "bull sessions on Marxism" or "giving out leaflets" outside the protection of the First Amendment. If it be accepted, as it must be on this record, that Deutch and all his associates did no more than this (or that that was all he knew about) where is the "core" of violent revolution, the discovery of which justifies such a congressional inquiry in the first place? If it is the legitimacy of tracking to its lair these violent tenets which permits summoning the citizenry to the seat of government and requiring of them compulsory disclosure of matters which, in the absence of such a core, would be clearly protected as classically political, we can say that in this hearing the committee was taken into the lair; the committee was informed on the core. Here, in short, the central,

secret, arcane data, the need for which justifies the congressional probing into sensitive First Amendment areas, was revealed. How can the withholding of collateral matters, which, if pertinent at all, are so only because of their possible relation to a core of force and violence, be the basis for criminal action, where the core itself is fully revealed. Otherwise the tail wags the dog.

This situation is in no way similar to that in *Barenblatt*. To be sure, it was there *argued on appeal* that Barenblatt's membership was in Communist Party groups which were interested only in the theoretical discussion. But that argument was unsupported by anything in the record. To such a contention it might well be rejoined,—"If so, why did he not tell the committee this?". Barenblatt had his opportunity before the committee to do what this petitioner did. In the *Barenblatt* case the committee got no information. In the Deutch hearing what the Committee got far exceeded what was withheld, and the Committee obviously could have obtained more information had they cared to ask.

The theory under which otherwise patent infringement of First Amendment rights has been justified in the field of congressional investigations is that in the center of the labyrinth which is the Communist Party sits the menacing Minotaur of force and violence. Whether the potential in our society of this Minotaur is such as to require the erosion of the foundations of our own citadel is not here argued and it is conceded that in the center of the labyrinth there is, in fact, force and violence. But it must be realized that in the torturous alleys of the Party are many cul-de-sacs, some of them well removed from the violent center. And that the Party was compartmented. Also, enough has been revealed so that we know that noviates were not exposed to everything at once. The uncontradicted record establishes that the student group at Cornell was in one of these byways and that the committee was led directly there, even if those in the circle (having been identified by others) were not fingered by this particular guide.

The nature of petitioner's "membership" is also relevant in the weighing process. Enough is now known about the Communist Party, U. S. A. to know that there is a vast difference in terms of "need to know" and in terms of the relevancy to national security in the information possessed by a Deutch and a Dennis. If there ever was a rank and file member of the Party it was Deutch. He had no card, he didn't know where the headquarters of the Party was [R. 304], and he did not know what the central committee of the Communist Party of Ithaca was. Some measure of the importance of petitioner's information may be gleaned by the fact that the FBI has never even bothered to call upon petitioner for a talk although they generally do so with ex-Communists.

None of this is to say that Deutch should be acquitted because he was a very little Communist in a very little pond, but rather because these are "the particular circumstances" in the light of which this Court, in *Barenblatt*, said the balance between competing private and public interests must be made.

## CONCLUSION.

It is respectfully submitted that the decision of the lower Court should be reversed.

Respectfully submitted,

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